IN THE

Supreme Court of the United States

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October Term, 1976

No. A-721

— 76-1385

PATRICK JOSEPH SEXTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE

BRIEF FOR RESPONDENT IN OPPOSITION

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TOPICAL INDEX

Brief for Respondent in Opposition	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701	7, 8
Hortonville Joint School District No. 1 v. Hortonville Education Association, ... U.S. ..... , 49 L. Ed. 2d 1, 96 S. Ct.	5
In re Bye, 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382	7
Kramer v. Municipal Court, 49 Cal. App. 3d 418, 122 Cal. Rptr. 672	7
Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893	5, 7
Meachum v. Fano, ... U.S. ..... , 49 L. Ed. 2d 451, 96 S. Ct.	8, 9
Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593	6, 7

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305	7

United States Constitution	
Fifth Amendment	2
Fourteenth Amendment	2

Statutes (California)	
Vehicle Code § 23102(a)	2, 3

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OPINION BELOW

Petitioner has attached to the petition, as Appendix A, a copy of the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Orange, filed without opinion, November 29, 1976.

JURISDICTION

The jurisdictional facts of the case appear adequately set forth in the petition.

QUESTION PRESENTED

Whether due process of law, as contemplated by the Fifth and Fourteenth Amendments to the United States Constitution, entitles Petitioner to a hearing when he is removed from a private alcohol-abuse program, and if so, whether that hearing must be somehow greater in scope than that offered him here.

STATEMENT OF THE CASE

On June 21, 1974, a complaint was issued and filed in the Municipal Court of the Central Orange County Judicial District, County of Orange, State of California, charging Petitioner with a violation of California Vehicle Code Section 23102(a), commonly known as driving under the influence of alcohol and/or drugs. Petitioner was arraigned on the charge and entered a plea of not guilty.

On a date set for jury trial, after Petitioner's case had twice been continued on his motion, he entered into a stipulation with the prosecution, whereby his case would be continued in order that he could enroll in and attempt to complete an alcohol-abuse program administered by the Lucky Deuce Foundation, a private organization.

That stipulation has never been made a part of the record in the case except as it is reflected in the notices of termination

from the program filed with the court (see Appendix A, attached hereto) and the transcript of the proceedings in court when Petitioner's 23102(a) case was submitted on the basis of that stipulation and any evidence he chose to submit in addition (see Appendix B, attached hereto).

The stipulation was accepted by the court, and Petitioner's case thereafter continued for several months. On December 26, 1975, however, the Lucky Deuce Foundation notified the court that Petitioner had been terminated from the program for several reasons, including his arrest for another violation of Vehicle Code Section 23102(a) in Los Angeles. See Appendix A. (Appendix p. 4.)

Continuances of Petitioner's case were thereafter denied, and on April 22, 1976, the case was submitted on Petitioner's stipulation, which, according to the transcript included an admission of a blood-alcohol level of .26 and the fact that Petitioner was under the influence of alcohol. Petitioner declined to present additional evidence and was convicted. The court refused to hold a hearing on the issue of whether Petitioner was "properly" terminated from the Lucky Deuce Foundation program.

The Petitioner was placed on informal probation, on the condition that he violate no law, pay a fine, and serve a statutorily mandated minimum 48 hours in the county jail. Execution of sentence was stayed to allow the Petitioner time within which to appeal.

Petitioner's conviction was affirmed by the Appellate Department of the Superior Court on November 29, 1976.

ARGUMENT

Petitioner contends that he has been unconstitutionally deprived of his "rights under the due process clause of the Fourteenth Amendment . . . in that he was not allowed a hearing before his status with the Lucky Deuce Foundation program was arbitrarily terminated and revoked." Petition, page 10. This argument, while possessed of a facile surface credibility, is unsupported by either fact or law.

Respondent's initial difficulty with Petitioner's position lies in his argument that he was "not allowed" a hearing before being terminated from the program administered by the Lucky Deuce Foundation. This argument is only fathomable if it is assumed that Petitioner asserts that he has a right to a *judicial, evidentiary* hearing, and Respondent is unable to find support for such a contention.

It must first be emphasized that the "Notice of Termination" filed by the Lucky Deuce Foundation on December 26, 1975, recites that "Defendant did not appeal the staff action to the Appeals Committee consisting of three Lucky Deuce graduates. Appeal process explained, offered, but defendant declined." Appendix A.

The nature of this process seems rather clearly delineated by the following paragraph of the form, inapplicable to Petitioner's case, and therefore left incomplete by the Foundation:

> [ ] DEFENDANT DID APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE. A HEARING *DE NOVO* WAS HAD ON _____ (DATE) THE DEFENDANT WAS PRESENT (WITH) (WITHOUT) COUNSEL, _____. THE APPEALS COMMITTEE, BY A VOTE OF ____ TO ____ , SUSTAINED THE ACTION TO TERMINATE, AND UPON ITS FINDINGS AND CONCLUSIONS, TERMINATED THE DEFENDANT AS REPORTED AT LINE _____ OF PAGE 1, HEREOF.

For reasons unexplained on the record in this case, two such notices were filed: One on December 26, 1975, and one on February 12, 1976. Both, however, indicate Petitioner's failure to take advantage of his appeal rights with the Foundation.

Clearly, then, Petitioner *was* offered a hearing, presumably *de novo* at his option, with or without counsel, before a committee made up of Foundation members. It is respectfully submitted that this process was not only constitutionally unobjectionable, but, considering the private, non-judicial nature of the Foundation, remarkably fair and well-delineated.

It is true that Petitioner was not allowed a hearing by the court before which his misdemeanor case was pending. Respondent, however, is unable to find authority for an argument that a full judicial hearing was required.

What due process requires is merely that an impartial hearing be provided. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S., at 171-172, 95 L. Ed. 817, 71 S. Ct. 624 (Frankfurter, J., concurring)." *Mathews v. Eldridge*, 424 U.S. 319, 348-349, 47 L. Ed. 2d 18, 41, 96 S. Ct. 893. Both notice and opportunity were afforded Petitioner in this case.

Similarly, in *Hortonville Joint School District No. 1 v. Hortonville Education Association*, ... U.S. ..... , 49 L. Ed. 2d 1, 96 S. Ct. ..... , decided only last term, the Court held that

due process had been afforded teachers striking in protest of actions by the school board, where they had a right to hearing by the board itself. Even *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593, the capstone of Petitioner's case, contemplates not a judicial hearing, but an administrative one, first by an impartial parole officer, and then by the parole board. 408 U.S. 471, 486-487, 33 L. Ed. 2d 484, 497-498, 92 S. Ct. 2593.

The hearing offered Petitioner in this case seems more than sufficient to comport with the mandates of these cases. In any event, no showing has or can be made that the procedure outlined in the Notice of Termination would have been unfair to Petitioner on the record before this Court.

All of which, of course, assumes *arguendo* that Petitioner, under the peculiar circumstances of this case, had any due process rights to a hearing in the first place. Respondent respectfully submits that there is no constitutionally cognizable due process right to participation in a private, non-statutory, non-governmental alcohol-abuse program.

The Lucky Deuce Foundation is, after all, a private entity. It is neither statutorily created nor governmentally funded. Its only involvement in this case is that it accepted Petitioner as a participant in its alcohol-abuse program. Based upon that acceptance, Petitioner was able to persuade the prosecution to stipulate to a continuance of his case, and possibly a favorable disposition of it in the event Petitioner successfully completed the program.

Unfortunately, Petitioner has never made the stipulation itself part of the record. That alone would seem to make this an inopportune case in which to attempt to determine the constitutionality of the procedures employed. The termination notice and the transcript of proceedings in the trial court rather clearly indicate that by its terms Petitioner admitted his blood alcohol level and that he was under the influence, but retained the right to offer additional testimony. Transcript April 22, 1976, p. 3, lines 7 - 12; Termination Notice, Appendix A, p. 1. Yet, nothing in the record provides the Court with the full stipulation.

At any rate, there is no indication that the stipulation purported to divest the Foundation of its ability to administer its own program. It remained a private entity with a right to perform its function without supervision by the State of California.

This was not, after all, a situation in which Petitioner was enmired in a state-created corrections system such as in *Morrissey v. Brewer, supra*. It was not even a situation in which he was enrolled in a governmentally created program such as in *Mathews v. Eldridge, supra*, or *In re Bye*, 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382, *People v. Vickers*, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305, and *Kramer v. Municipal Court*, 49 Cal. App. 3d 418, 122 Cal. Rptr. 672, the state decisions upon which Petitioner relies.

Petitioner entered into a stipulation granting him a continuance so that he could take part in this *private* program. He was not legally required to do so, and the program he chose was neither created nor administered by the state. Under those circumstances, his relations *vis-a-vis* the Foundation simply did not involve his constitutional due process rights.

The case is therefore more similar to *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701, in which this Court held that employment by even a state college

does not vest in the employee a due process right to *continued* employment, requiring a hearing upon termination. As the Court, per Justice Stewart, pointed out, " . . . the range of interests protected by procedural due process is not infinite." 408 U.S. 564, 570, 33 L. Ed. 2d 548, 556-557, 92 S. Ct. 2701.

To the same effect is *Meachum v. Fano*, ... U.S. ..... , 49 L. Ed. 2d 451, 96 S. Ct. ..... . There, inmates at a state correctional facility were transferred to other facilities after having been implicated in a series of fires in the prison. Like Petitioner, they argued that they had a right to remain where they were until accorded a hearing complying with procedural due process requirements. The Court, however, rejected this argument, emphasizing that they had no *right* under state law to be in any particular correctional institute.

Respondent respectfully submits that Petitioner is in the same position as the inmates in *Meachum*. He has no legal right to participation in the Lucky Deuce Foundation, so his termination therefrom does not require a hearing. It is true that his failure to fulfill the program exposes him to state action disagreeable to him, just as it did the inmates in *Meachum*, but, as Mr. Justice White pointed out in that case, "We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." ..... U.S. ..... , 49 L. Ed. 2d 451, 458, 96 S. Ct. ..... .

The Court went on to emphasize that:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause.
>
> ..... U.S. ..... , 49 L. Ed. 2d 451, 458, 96 S. Ct. ..... .

Respondent respectfully submits that a required hearing under these circumstances would similarly involve the state courts in monitoring of private organizations not properly within their purview.

The practical effects of such a rule are staggering. Petitioner acknowledges the desirability of the criminal justice system's present experimentation with various programs for the rehabilitation of the drinking driver, and cautions against "misuse or abuse" of these programs. (Petition, p. 10.) What he overlooks is the reluctance to participate of private organizations such as the Lucky Deuce Foundation, the Red Cross, Alcoholics Anonymous, or any of a number of similarly situated private entities, if they are to be subjected to court scrutiny in their decisions concerning who is fulfilling *their* criteria and who is not.

It requires no outstanding prescience to anticipate the reaction of a private foundation upon being told by a defendant, "Yes, I want to benefit from your program, please accept me; but if you do I'm going to require you to satisfy a court that you are properly administering *your* program." Private entities will drop these programs–at least insofar as they are available to defendants with *pending* cases–like the proverbial hot rock.

Respondent does not believe that such a misfortune is mandated by the Constitution or the decisions of this Court.

It should not now be mandated where a completely private, non-governmental agency has become involved in the case at Petitioner's behest. Certainly, it should not be mandated on a record which does not fully reflect the stipulation involved, but does indicate Petitioner's refusal of a hearing by the private foundation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CECIL HICKS, District Attorney
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MICHAEL R. CAPIZZI
Assistant District Attorney

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Head, Writs and Appeals Section

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INDEX TO APPENDIXES

		Page
A	Notice of Termination - Request Action Proceed to Court Trial (dated February 12, 1976)	1

	Notice of Termination - Request Action Proceed to Court Trial (dated December 26, 1975)	3
B	Page 3 of Transcript of Proceedings April 22, 1976	6

APPENDIX A

NOTICE OF TERMINATION
REQUEST ACTION PROCEED TO COURT TRIAL
[Form 4107512]

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Municipal Court, Central Orange County Judicial District.
PEOPLE vs. PATRICK JOSEPH SEXTON
CASE NO. 356047

DEFENDANT HAS BEEN TERMINATED FROM FURTHER PARTICIPATION IN THE LUCKY DEUCE® PROGRAM. FURTHER DELAY IN THE ADJUDICATION OF THIS ACTION IS NOT IN THE INTEREST OF JUSTICE.

PARAGRAPH 7 OF THE LUCKY DEUCE® STIPULATION PROVIDES:

> **"In the event defendant (A) fails to comply sufficiently with the requirements of the curriculum, (B) fails to prove the achievement of actual, long term Productive Sobriety, (C) shall resign, or (D) is terminated from the curriculum because defendant cannot complete the program, *then*, upon due notice, the program period shall be terminated forthwith and said action set for trial on the evidence herein stipulated plus such other evidence as the parties may offer, shall proceed to verdict, and in the event of guilty verdict, shall proceed to arraignment for, and pronouncement of, judgment according to law.**

[XXXX] DEFENDANT HAS NOT COMPLIED SUFFICIENTLY

WITH THE REQUIREMENTS OF THE CURRICULUM.

[XXXX] DEFENDANT FAILED TO PROVE THE ACHIEVEMENT OF ACTUAL, LONG TERM PRODUCTIVE SOBRIETY.™.

[ ] DEFENDANT HAS RESIGNED FROM THE LUCKY DEUCE PROGRAM.

[XXXX] DEFENDANT CANNOT COMPLETE THE PROGRAM.

[XXXX] TERMINATED BY REASON OF: HAS NOT COMPLIED WITH REQUIREMENTS OF PHASE III, LUCKY DEUCE PROGRAM.

[XXXX] DEFENDANT DID NOT APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE CONSISTING OF THREE LUCKY DEUCE® GRADUATES. APPEAL PROCESS EXPLAINED, OFFERED, BUT DEFENDANT DECLINED.

[ ] DEFENDANT DID APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE. A HEARING *DE NOVO* WAS HAD ON _____(DATE). THE DEFENDANT WAS PRESENT (WITH) (WITHOUT) COUNSEL, _____. THE APPEALS COMMITTEE, BY A VOTE OF_____ TO_____, SUSTAINED THE ACTION TO TERMINATE, AND UPON ITS FINDINGS AND CONCLUSIONS, TERMINATED THE DEFENDANT AS REPORTED AT LINE ____ OF PAGE 1, HEREOF.

No Further Continuances For Any Purpose Of The Lucky Deuce® Program Are Acceptable

STAFF OFFICER'S CERTIFICATION

We declare: We have personally prepared this Notice of Termination. We know the facts and the circumstances therein

reported to be true and correct. Executed under Penalty of Perjury on FEBRUARY 12, 1976.

/s/ GLORIA A. FORREST GLORIA A. FORREST

/s/ MARK F. JOSEFF MARK F. JOSEFF

NOTICE OF TERMINATION
REQUEST ACTION PROCEED TO COURT TRIAL
[Form 4107512]

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Municipal Court, Central Orange County Judicial District
PEOPLE vs. PATRICK JOSEPH SEXTON
CASE NO. 356047

DEFENDANT HAS BEEN TERMINATED FROM FURTHER PARTICIPATION IN THE LUCKY DEUCE® PROGRAM. FURTHER DELAY IN THE ADJUDICATION OF THIS ACTION IS NOT IN THE INTEREST OF JUSTICE.

PARAGRAPH 7 OF THE LUCKY DEUCE® STIPULATION PROVIDES:

"In the event defendant (A) fails to comply sufficiently with the requirements of the curriculum, (B) fails to prove the achievement of actual, long term Productive Sobriety, (C) shall resign, or (D) is terminated from the curriculum because defendant cannot complete the program, *then*, upon due

notice, the program period shall be terminated forthwith and said action set for trial on the evidence herein stipulated plus such other evidence as the parties may offer, shall proceed to verdict, and in the event of guilty verdict, shall proceed to arraignment for, and pronouncement of, judgment according to law.

[XXXX] DEFENDANT HAS NOT COMPLIED SUFFICIENTLY WITH THE REQUIREMENTS OF THE CURRICULUM.

[XXXX] DEFENDANT FAILED TO PROVE THE ACHIEVEMENT OF ACTUAL, LONG TERM PRODUCTIVE SOBRIETY. T.M.

[ ] DEFENDANT HAS RESIGNED FROM THE LUCKY DEUCE PROGRAM.

[XXXX] DEFENDANT CANNOT COMPLETE THE PROGRAM.

[XXXX] TERMINATED BY REASON OF: DEFENDANT ARRESTED AUGUST 5, 1975 23102a LOS ANGELES JUDICIAL DISTRICT BOOKING NO. 3516-370.

[XXXX] DEFENDANT DID NOT APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE CONSISTING OF THREE LUCKY DEUCE® GRADUATES.

[ ] DEFENDANT DID APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE. A HEARING *DE NOVO* WAS HAD ON _____ (DATE). THE DEFENDANT WAS PRESENT (WITH) (WITHOUT) COUNSEL, _____ . THE APPEALS COMMITTEE, BY A VOTE OF _____ TO _____ , SUSTAINED THE ACTION TO TERMINATE, AND UPON ITS FINDINGS AND CONCLUSIONS, TERMINATED THE DEFENDANT AS REPORTED AT LINE _____ OF PAGE 1, HEREOF.

No Further Continuances For Any Purpose Of The Lucky Deuce® Program Are Acceptable

STAFF OFFICER'S CERTIFICATION.

We declare: We have personally prepared this Notice of Termination. We know the facts and the circumstances therein reported to be true and correct. Executed under Penalty of Perjury on December 26, 1975.

/s/ RICHARD A. PALMER RICHARD A. PALMER

/s/ BETTY SPRINGER BETTY SPRINGER

PAGE 3 OF TRANSCRIPT OF PROCEEDINGS
April 22, 1976

In the Municipal Court, Central Orange County Judicial District.

PEOPLE vs. PATRICK JOSEPH SEXTON.

CASE NO. 356047.

. . . .

is a stipulation – in essence it is a submission on the preliminary hearing transcript which amounts to a guilty plea, and in essence I feel this stipulation in this case is tantamount to a guilty plea. The Court, as I believe, has indicated such in open court and chambers, it's a guilty plea.

THE COURT: It looks like it. I don't think it prohibits the defendant from testifying, but the stipulation indicates – that bearing his signature – indicates he was over .10, a .26, and in fact under the influence of alcohol. So I assume it doesn't prevent him from testifying but it would be contradictory to stipulation.

MR. MOSS: At the time he entered that stipulation he stipulated to certain facts; and whereas I do not wish at this time to go into the stipulation per se, I'm not going to attack the stipulation now, recognize or acknowledge it or give it any credence to that stipulation, I think contention –

THE COURT: I think we're probably getting out of order because basically what the People have done is submitted the stipulation as their case in chief and it will be received as People's 1 into evidence. Then the People have rested. So really what we are doing now is asking if you have any evidence.

MR. MOSS: Well with respect to the question on that specific issue, I do not have any evidence to offer to

. . . .

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JUNE 16, 1977, I served the within BRIEF FOR RESPONDENT IN OPPOSITION (NO. A-721) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ROBERT M. MOSS
6404 Wilshire Boulevard
Suite 1001
Los Angeles, California 90048
2 copies

EVELLE YOUNGER, Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
1 copy

W. E. ST. JOHN, Clerk
Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. ROBERT P. KNEELAND
Judge of Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. WILLIAM C. SPEIRS
Judge of the Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. WALTER CHARAMZA
Judge of Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

1 copy only to each of the above judges
and 1 copy to the Clerk of the Superior Court

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON JUNE 16th, 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer